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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 190

E. E. MORGAN & COMPANY,

Appellant,

vs.

STATE OF ARKANSAS FOR THE USE AND BENEFIT OF PHILLIPS COUNTY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS.

BRIEF IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM.

WM. M. HALL,
Counsel for Appellant.

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BRIEF OF APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

I.

The Supreme Court of Arkansas Did Decide a Federal Question.

The validity of the Arkansas foreign corporation statutes was drawn into question in the Circuit Court and the Supreme Court of Arkansas, upon the ground that they were repugnant to an Act of Congress (Flood Control Act) and the commerce clause of the Federal Constitution and the due process clause of the 14th Amendment as applied to appellant, a foreign corporation having a Government contract under said Act to perform in the State of Ar-

kansas, and the Supreme Court of Arkansas decided the question in holding that appellant was subject to fine under the Arkansas foreign corporation statutes for entering the State of Arkansas and constructing a flood control levee under its contract without getting the State's permission so to do by domesticating under its foreign corporation laws, and expressly holding that the putting of such interpretation upon the statutes did not render them repugnant to the commerce clause and the Act of Congress and the due process clause of the 14th Amendment. There was no other question raised in the case.

That that was a substantial Federal question there can be no doubt under the cases hereinafter referred to.

II.

There is a Substantial Federal Question.

The previous decisions of this Court have not settled the question against appellant's contention. There has really been no case in which the exact question has been presented and decided but there have been statements of this Court in various cases upon the question which appears to have practically settled the question in appellant's favor.

Stockton v. *Boston & N. Y. R. R. Co.*, 32 Fed. 9, involved a corporation in a very similar position. Justice Bradley, on circuit, heard and decided the case. It involved the right of a corporation of one State to go into another State to perform a contract given to it by the Federal Congress and Justice Bradley held that the corporation did not have to get the permission of that State to perform its contract therein.

In *Pembina Silver Min. & Mill. Co.* v. *Pa.*, 125 U. S. 181, 31 L. Ed. 650, the Supreme Court approved Justice Bradley's holding in the *Stockton* case. The *Pembina* case involved the liability of a foreign corporation to the State

of Pennsylvania for a statutory penalty for setting up an office and doing business in that State. And this Court held that the corporation was not within either of the exceptions to the general rule that a corporation of one State can do business in another State only with its permission and was therefore liable for the statutory penalty, but following Justice Bradley in the *Stockton* case, stated that the exceptions from the general rule were where the corporation was in the employ of the Federal Government or where the business was strictly commerce, interstate or foreign.

In *Horn Silver Min. Co.* v. *N. Y.*, 143 U. S. 305, 36 L. Ed. 164, which involved a question similar to that in the *Pembina* case, this Court laid down the same rule.

General Construction Co. v. *Fisher*, 149 Ore. 84, 39 P. (2d) 258, 97 A. L. R. 1252, 292 U. S. 715, 79 L. Ed. 1671, cited by appellee's counsel, did not present the question. The foreign corporation involved in that case was duly qualified under the laws of Oregon to do business therein. The question presented was whether that corporation was liable for a privilege tax based upon its income from a Federal contract which it was performing in the State of Oregon. The Supreme Court of Oregon held the corporation liable for the tax upon the ground that the tax was upon the contractor's property and its use in that State without respect to the name by which the tax was called.

James v. *Dravo Contracting Co.*, 302 U. S. 134, 82 L. Ed. 125, did not involve the question. The foreign corporation in that case had also qualified to do business and the question was its liability for tax based upon its income from its Federal contract, just as in the *Fisher* case.

Trinity Farm Construction Co. v. *Grosjean*, 291 U. S. 466, 78 L. Ed. 918, cited by appellee's counsel, involved the liability of a corporation with a flood control contract, for tax upon gasoline used by it in propelling the machinery with which it was performing the work and this Court held that

the contractor was liable for the tax. The case did not involve the right of a foreign corporation with a Federal contract to enter a State where the work was to be done without domesticating under the foreign corporation laws of that State.

The holding that a Federal contractor was liable for taxes under the laws of the State where the work was being done, casts no light upon the question here, because Chief Justice Marshall in *Osborn* v. *Bank*, 9 Wheaton 738, 868, 6 L. Ed. 204, 234, had long before laid down the rule that a Federal contractor could be taxed upon the property used under the contract but could not be fined for entering a State and working under the contract.

There is, therefore, a difference between the two propositions which must be kept in mind.

Chief Justice Hughes evidently had this in mind when in the *Dravo* case, he said: "The application of the principle which denies validity to such a tax has required the observing of close distinctions in order to maintain the essential freedom of the Government in performing its functions without unduly limiting the taxing power which is equally essential to both nation and state under our dual system."

Realizing that appellant's claim of exemption from fine under the Arkansas statutes, is based upon its Governmental agency, counsel for appellee cite *Trinity Farm Construction Co.* v. *Grosjean ante*, and *James Stewart* v. *Sadrakula*, 309 U. S. 94, 84 L. Ed. 596, as holding that a Government contractor is not a Governmental agency or instrumentality.

In the *Trinity Farm* case the contractor claimed exemption from the gasoline tax on the ground that it was a Governmental agency or instrumentality. This Court held that it was an independent contractor and not a Governmental instrumentality and was, therefore, not exempt from the tax. This was obviously for the reason that the tax had

reference to the contractor's ways and means of doing the work and not to its status with respect to the object of the contract to be accomplished. The decision could have been justified under the rule of the *Osborn* case without that predicate.

In the *Sadrakula* case the contractor predicated upon its Governmental agency or instrumentality its claim of exemption from liability for personal injuries resulting from its failure to provide safety devices required by the local laws and this Court held in effect that it was not a Governmental agency in the sense to exempt it from liability for such injuries under the State law. The reason for the decision was obviously that such a liability relates to the contractor's way of performing its contract, in respect to which the contractor is always considered independent.

A contractor with work to do for the Government under a contract, is an independent contractor with respect to his way and manner of doing his work thereunder, but a Governmental agency or instrumentality with respect to the object to be attained by performance of the contract, and as the Governmental exemption with reference thereto. This is indicated in *Salliotte* v. *King Bridge Co.* (C. C. A. 6) 122 Fed. 378, 65 L. R. A. 620, and *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, 84 L. Ed. 554.

Appellant's status was that of a Governmental agent in entering the State of Arkansas and performing the contract, as its action related to the accomplishment of the Governmental object, and not to ways and means of doing the work. Appellant's liability for injuries to persons or property would have been determined by the laws of Arkansas, as they would necessarily have related to its ways and means of doing the work, just as the contractor was held liable in the *Sadrakula* case, but not to being fined for coming into the State and doing the work without having domes-

ticated, because that would relate entirely to the Governmental object of its employment.

This Court held in *Johnson* v. *Maryland*, 254 U. S. 51, 65 L. Ed. 126, under the principle of the *Osborn* case that a State could not make requirements as to the qualifications of Government employees or contractors.

That is the principle invoked in this case. To require appellant to domesticate before performing its contract was to require of it a qualification contrary to the rule of that case.

This case not only presents a Federal question that is substantial but one that is necessarily important to both the Government and Federal contractors and the States wherein the Government does work by contract.

Appellee's motion should be denied. *Alton R. R. Co.* v. *Ill. Commerce Commission*, 305 U. S. 548, 83 L. Ed. 344.

WM. M. HALL,
Counsel for Appellants.